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Supreme Court, U.S.
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No. 04-1043

In The Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF AF-CAP, INC.

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
RONALD W. KLEINMAN
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-3100

Attorneys for the Respondent

**Counsel of Record*

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OR CALL COLLECT (402) 342-2831

Respondent Af-Cap, Inc. ("Af-Cap") recently learned of a new development in this case that should be brought to this Court's attention. On March 4, 2005, Af-Cap, a judgment creditor seeking to enforce a judgment for an undisputed debt owed by the Republic of Congo ("Congo"), filed an opposition to a petition for writ of certiorari jointly filed by the Congo and CMS Nomeco Congo Inc., The Nuevo Congo Company, and Nuevo Congo Ltd. (collectively "CMS"). Four days later, on March 8, 2005, the Congo informed the district court judge that it would not obey the district court's order implementing the Fifth Circuit's decision that is the subject of the petition.[1] *See* Letter from Rodolphe Adada, Minister of Foreign Affaires and Francophony to Judge Sam Sparks, dated March 3, 2005. (A certified translation provided by the Congo is included in the Appendix to this brief). The Congo's refusal to comply with the lower court's order implementing the Fifth Circuit's opinion should deprive it of the right to pursue a writ of certiorari in this Court for the reasons that follow.

"Litigation entails reciprocal obligations: an appellant (or petitioner) who demands that the United States respect a favorable outcome must ensure that an adverse decision also can be carried out." *Sapoundjiev v. Ashcroft*, 376 F.3d 727, 728-29 (7th Cir.), *reh'g denied*, 384 F.3d 916 (2004); *citing Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993); *Smith v. United States*, 94 U.S. 97 (1876). *See*

[1] The Congo sought a stay without bond from both the Fifth Circuit and the district court. Af-Cap did not oppose a stay so long as the Congo posted a supersedeas bond for the entire amount at issue, but the Congo declined to do so. Both the Fifth Circuit and the district court denied the stay. Neither the Congo nor CMS sought a stay from this Court. Instead, by the Congo's refusal to comply with a federal court order, they appear to have unilaterally granted themselves a stay.

also Molinaro v. New Jersey, 396 U.S. 365, 366 (1970) (dismissing the appeal of a criminal conviction when the defendant who sought review is a "fugitive from justice," finding that the defendant's escape "disentitles the defendant to call upon the resources of the Court for determination of his claims."); *Eisler v. United States*, 338 U.S. 189 (1949).

This Court and the lower federal courts consistently have applied the "fugitive disentitlement doctrine" in civil cases against defiant parties. *See National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43-44 (1954) (affirming the dismissal of an appeal from a money judgment by a petitioner who failed to deliver the specified property to the court's receiver and failed to file a supersedeas bond, by analogizing those circumstances to dismissals based on the removal of the subject matter from the jurisdiction of the court); *Collazos v. United States*, 368 F.2d 190, 197 (2d Cir. 2004) (and cases cited therein); *United States v. $129,374 in United States Currency*, 769 F.2d 583, 588 (9th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986) (applying this "disentitlement doctrine" to civil cases); *Conforte v. Commissioner*, 692 F.2d 587, 589-90 (9th Cir. 1982) (holding that "disentitlement" is even more applicable in civil cases than criminal or quasi-criminal appeals because the appellant's liberty is not at issue and therefore "a fugitive from justice" was not entitled to engage the court's resources in a civil action related to his prior criminal conviction). *See also Ganem v. Ganem De Issa*, 269 So.2d 740 (Fla. Dist. Ct. App. 1972), *cert. denied*, 277 So.2d 284 (Fla.), *cert. denied*, 414 U.S. 1113 (1973). This remedy also has been applied in at least one case involving the Foreign Sovereign Immunities Act where, as here, a foreign government (or its instrumentality) ignored

a court order. *See United States v. Crawford Enterprises, Inc.*, 643 F.Supp. 370, 382 (S.D. Tex. 1986).

For these reasons, the joint petition for writ of certiorari filed by the Congo and CMS should be dismissed or denied.

Respectfully submitted,

ROBERT P. CHARROW*
LAURA METCOFF KLAUS
RONALD W. KLEINMAN
GREENBERG TRAURIG LLP
Suite 500
800 Connecticut Ave., N.W.
Washington, D.C. 20006
(202) 331-3100

Attorneys for the Respondent

**Counsel of Record*

APPENDIX

MINISTER OF FOREIGN AFFAIRES
AND FRANCOPHONY

REPUBLIC OF CONGO
Unité – Travail – Progrès

CABINET

MAEF 0744, CAB.SP.

Brazzaville, 03 March 2005

MINISTER OF STATE

Re: Republic of Congo v. Af-Cap, Inc.

Dear Judge:

I refer to the order issued by this court on 22 February 2005 (the "Turnover Order"), which provides, *inter alia*:

- "The Court hereby takes possession and control of all future royalty obligations owed to the Congo under the Convention [for the production of oil and gas in the Congo dated May 25, 1979] and this Order shall constitute a judgment lien upon the Congo's property interests in, and its rights to receive payment of, its royalty share" from oil companies operating in the Congo under a concession granted by the Congo in the Convention;

- "The Court further orders the Congo to turn over such royalty payments into the registry of the Court and to execute . . . [a] letter of instruction . . . to the parties who pay royalties under the Convention to the Congo revoking prior instructions regarding payment of the royalty. . . ."

This suit was initiated over four years ago with a view to persuading United States courts to authorize seizure of

the Congo's rights to mining royalties, which it collects within its own territory, in satisfaction of a debt purchased by a creditor without any right to said mining royalties. The Congo has strongly objected to this litigation, which is unfounded. It is premised on the erroneous notion that an American court may transfer the right of a sovereign nation – the Republic of Congo – to dispose of its resources within its own borders. The Republic of Congo has thus far endeavored to cooperate with United States judicial authorities in the hope that United States courts would recognize their obligation to respect the Congo's sovereignty, as is mandated not only under Congolese and international law, but under United States law as well.

In light of the judgments of this Court and the Court of Appeals for the Fifth Circuit, the Congo is constrained to protest in the strongest possible terms the failure to respect its sovereign rights and the resulting judicial measures that purport to dispossess the Congo of economic rights comprising its national patrimony and principal source of export revenue. It is an established principle of the law of nations that every state exercises full and permanent sovereignty over its natural resources and exclusive authority to control the economic exploitation thereof. The Congo's rights to the mining royalties within its territory are subject to its exclusive jurisdiction and sovereignty, which cannot be subordinated to the judicial measures of another state.

The Turnover Order issued by this Court is a clear violation by the United States of international law which recognizes the right for any sovereign State to exercise authority and control over its natural resources within its national territory. Such actions impact negatively on the relations between the United States and the Congo, undermining the concerted mutual efforts of both nations

to encourage private United States entities to invest in the Congo, in particular in the oil sector. This unfortunate development requires the Congo to reassess its relations with the United States, particularly where other sources of trade and investment such as Canada, Europe, India and China continue to respect the sovereignty of the countries with which they maintain an economic relationship.

The Turnover Order is unenforceable in the Congo, and cannot supersede the Congo's sovereign authority to prescribe and enforce its own laws within its own territory. Regretfully, the Congo must hereby advise the Court that, for the reason stated, the Congo will not implement the Turnover Order.

Please accept, Your Honor, the expression of my most distinguished consideration.

[seal: Minister of Foreign Affaires and
Francophony
Cabinet
Republic of Congo]

[signature]

Rodolphe Adada

Hon. Sam Sparks
United States District Judge
United States District Court for
The Western District of Texas
Austin, Texas

U.S.A.

copy: Hon. William H. Taft, IV
United States Department of State